No. 200.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1903.

A. CHESEBROUGH et al., Owners and Claimants of the Ship "Iroquois",
Petitioners,

vs.

MATTHEW BRIDGES,
Libelant and Respondent.

BRIEF ON BEHALF OF LIBELANT AND RESPONDENT.

On December 22, 1899, the American ship "Iroquois" sailed from New York on a voyage to San Francisco. During the voyage, on February 23, 1900, the libelant, while assisting in furling the mainsail, fell from the main-yard to the deck. The fall caused fractures of the tibia and fibula of his right leg, besides other injuries. At the time of the accident the vessel was in latitude 56 degrees 50 minutes south, longitude 67 degrees 36 minutes west, a few miles to the southward of Cape Horn, and libelant

thereafter the winds were fair for a southwesterly course from Port Stanley to the place of the accident. Not considering any progress the vessel might have made on such return during February 27 and 28 and March 1, she could have reached the place of the accident, with the favorable winds of February 26 and of March 2 and 3, within nine days after the accident.

As a matter of fact, according to the evidence of the chart (Claimants' Exhibit No. 2), the winds during February 23, 24 and 25, while fair winds for a course to Port Stanley, were unfavorable for the vessel's progress into the Pacific, and at the beginning of February 26 she was further east than she was at the beginning of February 23, thereby losing three days, so that had the vessel gone to Port Stanley the actual loss of time, *going and returning*, would have been not more than *six days*.

It is evident that the Court of Appeals was unwilling to accept the testimony of the master of the "Iroquois" that it would probably have taken from three to four weeks to have gone to Port Stanley *and return*, as that Court says (Trans. p. 128): "The District Court found "that to have returned there would have involved a "loss of time of three or four weeks, and in so finding "made, we think, more than liberal allowance for prob-"able delay and adverse winds."

The master, however, was not limited to Port Stanley as a place to land the libelant. With small loss of time he might have gone to several places, after rounding Cape Horn.

The vessel could have made Evangelistas or Direction Island on March 2 or 3, by sailing one or two days out of her course. Evangelistas Island, as shown by Claimants' Exhibit No. 2, is near the westerly end of the Straits of Magellan. On said island is a lighthouse, and a signal from the vessel would have brought a small steamer to her and libelant could have been taken to said island and placed on one of the line of steamers plying between Valparaiso and Sandy Point, and touching semi-weekly, going and returning, at said island. Sandy Point is on the northerly side of the Straits of Magellan, and has a population of about 2,500. If libelant had been landed at Evangelistas Island, he could have been taken to Sandy Point within a few days or to Valparaiso within two weeks after the accident, and his vessel could have proceeded on her course from Evangelistas Island with a loss of little more than one day in her voyage (Trans. pp. 97, 98, 99).

On March 1, the vessel was about latitude 55 South, longitude 75 West. With the winds encountered by the vessel thereafter, and prevailing in the month of March (summer time in that latitude), she could have made the port of Ancud, in Chili, in latitude 42 South, or thereabouts, on March 9, and from Ancud, as delineated on the chart (Libelant's Exhibit No. 4), could have reached the course she took to the equator with a loss of time in her voyage of only four days (Trans. pp. 96, 99, 100, 101).

With such winds she could have made the port of Valparaiso, in latitude 33 South, or thereabouts, on March

15, and from Valparaiso, as delineated on the charts (Libelant's Exhibits Nos. 4 and 5), could have reached her course to the equator with a loss of time in her voyage of only four days (Trans. pp. 96, 99, 100).

The charts (Libelant's Exhibits Nos. 4 and 5) are duplicates of the charts (Claimants' Exhibits Nos. 2 and 3), except that they also have traced on them by Mr. Carrescio, formerly an officer in the Chilian navy, the daily courses and distances the "Iroquois" in all probability approximately would have made, if on March 1 she had borne away for either Ancud or Valparaiso, and thence had proceeded from either of those ports to the course she actually pursued, and also the small loss of time in the voyage. Such tracings were made with reference to the winds encountered by the vessel after March 1 (Trans. pp. 99, 100, 101). Mr. Carrescio testified that in the month of March the winds are fair, on the courses so delineated, for reaching Ancud and Valparaiso, and that along that coast there is a current, called Humboldt current, running north about one mile an hour (Trans. p. 95).

The Court of Appeals found (Trans. p. 128) that the "Iroquois" could have made either Ancud or Valparaiso with a probable loss of not more than four or five days in her voyage.

If libelant had been taken either to Port Stanley, Sandy Point, Ancud, or Valparaiso, he could have received skillful surgical treatment, and could have had proper nursing and the appliances proper for his injured leg, and his leg could have been kept in a position of rest, a position abso-

lutely necessary for the union of fractured bones (Trans. pp. 92, 93, 96, 97, 98, 99).

In the vessel's course to Ancud or Valparaiso it was probable, in fact reasonably certain, that she would have met steamers bound to Valparaiso, Sandy Point or other South American ports, where libelant could have been taken for surgical treatment.

Libelant, at the time of the accident, was twenty years old and in good health (Trans. pp. 30, 31). Two surgeons testified that if simple fractures, similar to those of libelant, were first treated by a surgeon even four weeks after they were received, the bones would unite, and that broken bones of a person of the age of libelant, other conditions being the same, would unite more readily than those of an older person (Trans. pp. 76, 77 and pp. 83, 84), and that in the case of a simple fracture properly treated a union is complete in from four to six weeks after the fracture (Trans. pp. 80 and 87). One of the surgeons, Dr. White, amputated libelant's leg, and treated it a good portion of the time while libelant was in the hospital, and testified that libelant had no constitutional disease (Trans. pp. 72, 73, 76). The other, Dr. Lawlor, has had long and large experience as a practicing surgeon (Trans. p. 83).

The splints put around libelant's leg by the master were allowed to remain in place for five weeks, to wit, from February 23, the day of the accident, until March 30, when, as shown by the mate's log, the vessel was in latitude 7 degrees 50 minutes south, longitude 108 degrees 52 minutes west (Trans. p. 62). The testimony shows

that a surgeon would have removed the splints four or five days after first putting them on, and at intervals of a few days thereafter, for the purpose of examining the leg and determining whether the bones were properly in place and uniting (Trans. pp. 81 and 86).

The master testified that on March 30, when he first removed the splints, the leg seemed to be knitted. The libelant testified (Trans. p. 25) that after March 30, his leg was dressed by himself and his shipmates in the forecastle and (Trans. p. 26) that when the splints were off his leg was "loose" and "worked back and forth", "so that any body could see it". Dr. White also testified (Trans. p. 77) that there had been no union, and the history of the case is to the same effect. The District Court (Trans. p. 109), and the Court of Appeals (Trans. p. 126) wholly discredited the master's testimony in this regard, and found that the fractured bones had failed to unite. On March 30, however, the vessel was so near the equator and so far to the westward, that she was as near San Francisco as Valparaiso (San Francisco is about latitude 37 degrees north, longitude 122 degrees west, and Valparaiso is about latitude 33 degrees south, longitude 72 degrees west), and the master's many opportunities to land libelant in time to save his leg were gone.

When the vessel arrived at San Francisco, about two months and a half after the accident, the master allowed libelant to go ashore on crutches as best he could and gave him no further attention. Instead of providing a place for libelant in the cabin or in some other suitable place on his vessel of 1997 Register tons, and there making him as

comfortable as possible, and giving him the attention and diet proper and humane under the circumstances, the master kept him in the forecastle, where he was furnished with no different food than was provided for its other occupants (Trans. pp. 28, 32), and without assigning any one to assist him in answering the calls of nature. The master testified he told the steward to give libelant anything he asked for, but admitted he did not know what the steward did or did not in that regard. It appears that the master had theretofore suffered from a broken leg, but he was attended by a surgeon (Trans. p. 60). The master's disregard for libelant's comfort and health during the weeks he kept him on the vessel after the accident is in keeping with his disregard of his legal duty to take libelant either to Port Stanley or to one of the South American ports mentioned. If his wife or child had been with him and had suffered a similar injury, or if the vessel had been in need of a spar, we doubt not he would have gone into one of these ports. Libelant, in the performance of the duty he owed to his employers, had exposed his life and limbs for the preservation of the vessel. The footing of a seaman, while furling sail, is insecure in a high degree against the force of a gale of wind, and yet, when the libelant, under such conditions, lost his footing and received the injury he did, the master, with all the opportunities the situation offered him, considered the forecastle of a moving vessel good enough for libelant, and assigns as a reason for bringing him to San Francisco that he thought he could properly set and treat the leg. In other words, rather than to deviate from his course at a small expense to his owners and with a

loss of only a few days' time, he chose to risk bringing libelant to San Francisco and to expose him to the mortification likely to take place while passing through the tropics and to the accidents and discomforts inseparable from the unceasing motion of a ship at sea, and daily removals from his bunk for the performance of acts of nature, and entailed on libelant weeks of protracted and unnecessary suffering and the loss of a leg.

As said by Judge Sprague in *Brown vs. Overton,* 1 Sprague, 462, Fed. Case No. 2024, referring to the excuse of a master that his deviation to land an injured seaman would have occasioned expense:

> "This presents not the least extenuation. It is merely saying that if he had performed his duty, the owners would have been subjected to a burden which the law imposes."

And by the same Judge, referring to that master's doubts of any benefits to the seaman if he had landed him:

> "Any doubts would have been removed if the master had performed his duty. By going into port, it would have been ascertained what could have been accomplished."

By going into a South American port, after March 1, it would have been ascertained that libelant's leg had not begun to unite, and the leg would have been saved to libellant for the ensuing 41 years of his expectancy of life.

We urge upon the Court that the master had no right to speculate on the chances that the libelant's leg *might* be properly set and *might* remain so, and that the libelant *might* recover on board the vessel, when he had opportunities, with very little delay to the vessel, to place him

where he could have been properly treated and his leg saved to him beyond a peradventure. The results of such speculation are the loss to the libelant of a leg, and all its consequences during the remainder of his life. The libelant was 21 years old when this cause was heard in the District Court (Trans. p. 21). See "The American Table" (Trans. p. 122) used by the Mutual Life Insurance Company of New York in estimating the longevity of applicants for insurance (Trans. p. 69).

What was thought by the respondent's shipmates is to be found on page 30 of the transcript.

We quote from page 818 of *Bryant's Practice of Surgery*, third American edition, 1881, a standard work, as testified (Trans. p. 82) by Dr. White:

> "The principles of the treatment of fractures are very simple, though the practice is often very difficult. To restore a bone to its normal position, and to keep it there by means of surgical appliances, or as John Hunter expressed it in 1787, 'to place the parts in a proper position by art, that is, as near their natural position as possible, and keep them so', are simple rules to be observed, but to carry them out often demands the highest surgical skill and ingenuity, and yet the whole treatment of fractures is really comprised in these two indications."

We are not referred to any case, and we know of none other than the one at bar, in which the Court has deemed it necessary to speculate on what *might* have been the delay to a vessel *after* her departure from a port of distress, if she had gone to such port. We submit that if an injured seaman require surgical aid,

and if such aid cannot be given him on board his vessel, and if there is an available port to which he can be taken, the obligation of the master to take him to such port arises, and that the time involved in *going* to such port determines its availability. The District Court and the Court of Appeals found each of these three conditions in the case at bar.

Though the master be held to be a fellow-servant of the seaman in the navigation of a ship, he is not such fellow-servant

> "in respect to the owners' duty to the seamen which the master performs in their behalf and as the owners' representative * * * and when such duty is not performed and the seaman suffers injury from such neglect the ship in a proceeding *in rem*, and the owners in a suit against them, are liable for the damages suffered—"

Scarff vs. Metcalf, 107 N. Y. 211, 216,

where the cases on this point are cited by the Court. It is a case in which by a master's neglect to call a surgeon a seaman lost a leg by amputation.

The language of the Court in *Brown vs. Overton, supra*, is particularly pertinent to the case at bar:

> "Scarcely a case can be presented where the obligation to land an injured seaman applies with greater force than the present."

In *Peterson vs. The Chandos*, 4 Fed. 645, the vessel, when the fall of a seaman from aloft caused a fracture of the femur, was in latitude 38 South, longitude 90 West. A difference of opinion existed on board as to whether the leg was broken or not. The master testified that until 24

days later, when the vessel was north of the equator and 20 degrees further west, he did not think it was broken. The voyage was from New York to Portland, Oregon. Judge Deady found that it was very uncertain what time it would take to reach Valparaiso from the locality of the accident, there being no evidence of the force or direction of the wind between those places. He said (p. 652):

> "If it had been shown that the vessel could, under the circumstances, make about ten miles an hour, and thereby make Valparaiso in a little more than five or six days, it might have been proper for the master to have gone in there—indeed, I think it would have been his duty to do so."

Testimony as to the force and direction of the winds, lacking in the case of "The Chandos", is given in the case at bar.

The "Chandos", like the "Iroquois", was a ship with a full cargo. If it were the duty of the master of the "Chandos" to make such sacrifice of time and risk of cargo for his seaman, notwithstanding he did not think the leg was broken, how much greater the obligation in the case of the "Iroquois", where there was no doubt as to the severity of the injury, and where the master had a choice of available ports to which he could have taken libelant. The injury in the case of "The Chandos" occurred when that vessel was about 1100 miles almost due west of Valparaiso, and if she had gone to that port she would have lost about the same time while returning to the line of her course as in going therefrom to Valparaiso.

That, under the circumstances, and by virtue of the obligations of the contract between libelant and the vessel,

it was the duty of the master to land libelant at one of the places mentioned, we cite *Whitney vs. Olsen,* 108 F. R. 292.

The master of the "Iroquois" would have performed his duty if he had *honestly endeavored* to reach a port of distress. As he made no such endeavor, the contention of claimants that the time of a deviation (such as we allege should have been made) is problematical, is unworthy of consideration. If he had endeavored to make a port of distress it would have been ascertained what could have been accomplished.

The Court is asked by the petitioners to conclude that on March 1 and thereafter, the master was justified in his assumption that the broken bones were in place and properly uniting, and that therefore, there was no obligation to take libelant to any South American port or to deviate in an attempt to do so, and they say, on page 25 of their brief, that between February 23 and March 1, "there was " nothing to indicate that the libelant was not getting " along all right; he thought that he was, and so did the " master. No special circumstances connected with his " injury were developed to indicate that, for the purpose " of procuring surgical aid, it was necessary or advisable " to put the ship about and proceed to Port Stanley". We never have contended, and now do not contend, than on March 1st, it was the duty of the master to put the ship about and proceed to Port Stanley. On March 1st, six or seven days after the accident, the vessel was well into the Pacific and then the master had better opportunities to make Evangelistas Island or Ancud or Valparaiso than to make Port Stanley.

Certainly on March 1st there was nothing to indicate that the libelant *was not* getting along all right, if only indications discoverable on the outside of the bandages were necessary for a diagnosis of libelant's condition. Certainly, also, on March 1st, there was nothing to indicate that libelant *was* getting along all right, if indications only ascertainable after the removal of the bandages were not necessary for such diagnosis. If, on March 1st, or at any other *proper* time thereafter, the bandages had been removed, manipulation of libelant's leg would have indicated whether or not the broken bones then were in place, and whether or not it was necessary or advisable to make a port of distress. This was not done on March 1st, nor was it done until March 30th, and the master had no sensible basis until March 30th for any conclusion as to libelant's condition.

What is said in this connection is equally applicable to all times between March 1st and March 30th. It was during such period that the vessel was nearest to Ancud, and nearest to Valparaiso. Claimants' Exhibit No. 2 shows she was nearest Ancud at noon of March 9th when in latitude 42, and due west of that port. Claimants' Exhibit No. 3 shows she was nearest Valparaiso at noon of March 15th, when in latitude 33 and due west of Valparaiso. Without cause or investigation, the master was content to assume that libelant's leg was getting along all right, during all of the five weeks between the time of the accident and March 30th, on which day the vessel was as near San Francisco as Valparaiso.

We submit that the master's testimony that on March

30th, the bones seemed to be knitted all right, and his testimony (Trans. p. 50), when asked why prior to that day he did not go to a port of distress: "I did not think it " necessary to go into any port. * * * Entirely getting " along all right. * * * *I thought the leg would be all " right when he got here. * * * *I did not think it nec- " essary to put away, I did not see any need of it. I " did not think he could get any better treatment than " what I could give him myself at the time", was a mere subterfuge and a sham, manufactured as an excuse for not going to a port of distress. The master's *first examination* of libelant's leg, after his attempt to set it, was on March 30, fifteen days after he had passed the latitude of Valparaiso, when, as already stated, he was as near San Francisco as he was to Valparaiso. His reason for not going to a South American port was the expense to his owners and because to do so would have taken him out of the line of his course to San Francisco (Trans. p. 60). He admits that weather and conditions were favorable (Trans. p. 66). He says (Trans. p. 67), referring to the latitude of Valparaiso, "I did not make 30 miles a day in that latitude". The charts (Claimants' Exhibits Nos. 2 and 3) show the number of miles made each day by the vessel when in and about that latitude, except for March 12, and contradict such statement. However, the master should have set his course for Valparaiso or some South American port long before he reached such latitude.

If the "Iroquois" had borne away for Ancud or Valparaiso at a proper time, she would have taken a northerly or northeasterly course and from either of those ports she would have taken a northwesterly course to

the equator, and *during all such times* would have been advancing towards San Francisco, her port of destination, and in her course to Ancud or Valparaiso it is probable, in fact, reasonably certain, that, as before shown, she would have met steamers bound to Valparaiso, Sandy Point or other South American ports.

If, under the favorable circumstances of winds, weather and positions presented by the evidence in the case at bar it was not the duty of the master of the "Iroquois" to seek surgical aid for the respondent, it is difficult to conceive conditions on a voyage from New York to San Francisco which would make such a duty imperative.

We are not limited in our discussion of the negligence of the master after he got into the Pacific, as seems to be implied in the petitioners' brief, by the positions of the vessel when nearest Ancud and Valparaiso, which, as we have shown, were due west of those ports respectively, and we are not compelled to meet the objection of petitioners that those ports then were too distant, and that the voyage would have been unjustifiably prolonged if the vessel then had gone to either of them. The proper time for bearing away for Ancud or Valparaiso was on March 1st, or shortly thereafter. On Libelants' Exhibits Nos. 4 and 5 are shown the daily courses and distances the vessel in all probability approximately would have made, if, on March 1st, she had sailed for either of those ports, and thence had proceeded to the course she took to the equator, and also the small loss of time to the voyage. The master placed the proper point for first bearing away for Valparaiso at about latitude 50 degrees south, longitude 80

degrees west (Trans. p. 47). The charts show that he could have reached such point at about noon of March 3d. But, say petitioners, the vessel could not have sailed on a straight line thence to Valparaiso. The mate's log-book shows the daily winds encountered by the vessel thereafter, and such winds were fair winds for a course on an approximately straight line, either to Ancud or Valparaiso, and also thence to the course she took to the equator, and with a loss of time not exceeding four days. To this effect, also, is the testimony of Mr. Carrescio (Trans. pp. 99, 100, 101). Of course, the distance from a point of deviation to a port of distress is not to be doubled, in estimating the prolongation of a voyage, unless it would be necessary for the vessel to return to the vicinity of the point of deviation and there resume her original course.

We do not think it at all surprising, as suggested at the foot of page 24 of petitioners' brief, that libelant, on or after March 30, did not call the attention of the master to the fact that his leg was loose, and for the same reason that it *is* surprising to claimants, namely, that "anybody could see it". The only material fact is, that there was no union then or at any other time. That the libelant signed the entry on page 44 of the official log-book, cannot overcome the positive testimony, under oath, that the bones had not knitted, fortified as it is by the history of the case and all the probabilities; moreover, at the time he signed such entry he was sick and weak, and in consequence made a cross, although able to write, and doubtless would have signed anything the master told him to sign, without giving thought to its contents or import.

The master testifies that libelant thought he was getting along all right. The libelant testified that whenever the bandages were removed he was conscious there was no union of the broken bones. At no time prior to March 30th, was it possible, without removing the bandages, for either the libelant or the master to know whether the libelant was getting along all right. Libelant's condition at any time could have been ascertained by uncovering his leg; moreover, even if manipulation had shown that the bones, fortunately, were in place, we contend it was the duty of the master to have borne away for Evangelistas Island, Ancud or Valparaiso, at a proper time, as at any moment thereafter, the unceasing and often violent motion of the vessel or the necessary daily moving of libelant might have, and undoubtedly would have, displaced them.

A good portion of petitioners' brief is in praise of the master's general treatment of libelant after the accident, and the master's conduct in that regard, as viewed by their counsel, is urged with the design to distinguish the master as a commander of due discretion, reasonable, prudent and humane, uninfluenced by selfish motives, and completely faithful to his obligations to libelant when he brought him crippled to San Francisco, instead of procuring him surgical treatment after his injuries. We are unable to join in such laudation. Such a master, under the circumstances of this case, would have gone or attempted to go to Port Stanley, or in the early days of March would have satisfied himself of the condition of his injured seaman, by removing the bandages, the only possible way to learn such condition, and even if such investi-

gation disclosed that the bones then were in proper place, his prudence and humanity, in view of the probability of subsequent displacement if the seaman were retained on the vessel, would have suggested the advisableness of making, or at least, attempting to make, a port of distress. Such a master, while the injured seaman remained in his vessel, would have kept him in the cabin or in some more appropriate place than the forecastle, and would have considered it his duty to know whether or not his steward was giving the seaman the food and attention proper for his condition.

The master testified that when he himself did not dress libelant's leg the steward did (Trans. p. 62). Such dressing was not begun until March 30th, when the bandages first were removed, and was because of sores on the leg caused by the bandages, and then first discovered by the master, We submit that the degree of the master's care of libelant after the accident is not to be measured by the vaseline supplied on and after March 30th, for the relief of libelant's sores, or by the salts, the administration of which to the libelant is so highly commended by petitioners' counsel. The petitioners have not attempted to show that the master was unable to provide more comfortable and appropriate quarters than the forecastle for libelant, during the two and a half months after the accident, or that the forecastle was a proper place for a seaman suffering with a broken leg. The master's testimony gives no excuse for keeping libelant in the forecastle, or for failing to provide some member of the crew to help libelant to attend to the calls of nature. This service

was performed by the humanity of libelant's shipmates. The testimony of the master that the forecastle was dry and well-ventilated, even if true, furnishes no justification. That it was "warm" we may well believe. The master's disregard for libelant's comfort and his admitted ignorance of the kind of food actually served to libelant by the steward, are very significant in considering whether or not the master was uninfluenced by selfish motives and acted in good faith and fidelity to his duties and obligations in bringing libelant to San Francisco.

There is no contention by petitioners that the master did not know of conditions at Evangelistas Island and at Ancud. If he did not, he was incompetent for the command of the "Iroquois". He had been "round the Horn" sixteen times (Trans. p. 46) and had been a master four years (Trans. p. 59). Nor is there any denial by petitioners that surgical aid could have been procured at either of the places we have mentioned as ports of distress; that they could have been, is abundantly proved by the testimony of Mr. Carrescio. That libelant made no request to be landed at any port or place, or made no suggestion to that effect, is not material; it was one of the obligations of the contract of the owners with libelant, that if he should require surgical aid for an injury received in their service it should be furnished to him. The libelant was ignorant of his rights in the premises, as well as of the opportunities of the master to make a port of distress, but the master knew his duty and his opportunities, and we apprehend that petitioners will not be allowed to escape liability because of the omission of

libelant to request the master to perform his known duty. The master stood *in loco parentis* to libelant, *Robertson vs. Baldwin*, 165 U. S. 287.

We leave it to the Court to determine, if necessary, whether it would have been proper if the master had put libelant on board a passing steamer, if it could have been done, or if he had transferred him to Evangelistas Island, thence to be shipped either to Sandy Point or to Valparaiso. Would he not be commended for either of such actions by all right-minded persons? Whether or not he could have put libelant on board a passing steamer would be more demonstrable if he had taken a course to make it possible, than by now discussing its probabilities. If libelant had been disposed of in either of these two ways, or taken to Port Stanley, Ancud or Valparaiso, there would be no escape for the payment of his wages up to the termination of the voyage. The vessel and her owners would be bound for such payment, and for the necessary attendance upon the libelant.

Whether or not there was an American Consul resident at Ancud or Sandy Point does not appear, nor is it material. There is an American Consul-General at Valparaiso, whose jurisdiction extends over the whole of Chili, and he undoubtedly could have been communicated with by telegraph, although it would have been wholly unnecessary. What libelant required was not an American Consul, but surgical aid, and it could have been found at either of these places, as well as Valparaiso. If Ancud had been the only accessible port of distress it was the duty of the master to take libelant to that port and leave

him there in charge of a responsible person, and make proper arrangements for his treatment and care, which he certainly could have done whether there was an American Consul at Ancud or not.

As to the effect on insurance, if the master had deviated for surgical aid for libelant, we say there is no testimony that either the vessel or her cargo or any part thereof was insured, and further we have been unable to find a case holding that a deviation to obtain surgical aid for an injured seaman avoided an insurance policy, or gave to the cargo-owner, *whether insured or uninsured* a cause of action against the ship-owner for damages to the cargo consequent on such deviation. All the authorities we have read are squarely against both of these contentions. In *Burgess vs. Equitable Marine Insurance Company,* 126 Mass. 70, it was held that a deviation, justified by necessity, did not avoid an insurance policy, and the subject is there very fully discussed. The Court says (p. 80),

> "Nor is the departure from the route for the purpose of saving human life a deviation; *nor is a policy avoided when the ship goes out of her course to obtain necessary medical attendance for those lawfully on board. Bond vs. Cora,* 2 Wash. C. C. 80; *Perkins vs. Augusta Ins. Co.,* 10 Gray 312; "*It is allowed from motives of humanity.*"

In *Perkins vs. Augusta Ins. Co.,* 10 Gray (76 Mass.) 312, the vessel went out of her course to obtain necessary medical attention for the captain's wife, who was not even a member of the crew. *Held,* that the deviation did not discharge the underwriter.

On this point see also the opinion of Judge Deady in *Peterson vs. The Chandos*, 4 F. R. 646, beginning near the bottom of page 652 and extending to middle of page 653.

The courts hold that it is not a deviation when the master goes out of the course of his voyage for the purpose of saving the lives of persons on board another vessel or on board his own vessel, or for medical or surgical aid for such persons, even though not members of his crew, and to whom his vessel owes no legal duty, *a fortiori* it is no deviation for a master to go out of his course to save the life or limb of a member of his crew or to procure medical or surgical aid for him in case of need, for in such case the vessel *owes* such legal duty by virtue of the contract between the vessel and the crew.

The solution of this question is what the law says a prudent and humane master, observing his duty to his owners and their obligations to an injured seaman, ought to do. Should the master of the "Iroquois" have taken chances, or should he have done that which would have, with certainty, saved the libelant's leg? We do not think any court of admiralty would hold that turning from a course for medical or surgical aid for an injured seaman was a deviation, even if it concluded that the master was unduly cautious in the interest of his seaman.

One of the results of the speculation of the master of the "Iroquois" is the loss to libelant of a leg. His conduct from the first shows that he never intended to go to a port of distress whether the leg was set properly or not, as he shaped a course which took him away from all opportunities to do so, thus proving that he regarded only the in-

terests of the owners and the progress of the voyage and wholly disregarded the rights of the libelant. Each day, after March 1, the vessel was further to the westward of South America than the day before. The law imposed on the master the duty of going to a port of distress, having the opportunity to do so, and will not permit him, when he has failed in that duty, to shield himself by saying that he thought he could treat libelant's leg properly on board the vessel. If he did not know he could treat libelant properly, and of course he could not have so known, it became his imperative duty to take him where he could receive proper treatment.

In *Tomlinson vs. Hewett,* 2 Sawyer 278, damages were decreed, because of the failure of a master to make proper arrangements for the treatment and care of a seaman, ill of the smallpox. Judge Hoffman in that case (p. 283) says:

> "The vigor with which courts of admiralty maintain and enforce not only the right of the seaman to be cured at the ship's expense, but also the duty of the master to omit no reasonable exertions to remedy or mitigate the effects of any accident that may happen to him is forcibly illustrated in the case of *Brown vs. Overton,* Sprague's Decisions."

"The Osceola", 189 U. S. 158, 175; distinctly recognizes the well settled law of the admiralty that a seaman injured, without his fault, in the service of a vessel, is entitled to be maintained and cured at the expense of the vessel.

It is admitted by the petitioners that for a breach of the obligation, on the part of the master or owner of a vessel, of the duty to provide medical and surgical care for a

seaman so injured, the owner is liable *in personam*, and the vessel *in rem*, in damages. The law on this subject is fully stated, and the authorities given, by the learned judge who delivered the opinion in the case of "*The Osceola*" (*supra*).

See cases cited in the opinions of the lower Courts in the case at bar.

See, also, "*The Troop*", 118 F. R. 769, decided in November, 1902, by Judge Hanford, of the District Court of the District of Washington. The libelant in that case brought his action against a vessel to recover compensation for excessive and unnecessary suffering, after a personal injury sustained by him while performing his duties as a member of the crew of said vessel, the master of which, instead of going to a proper port where the seaman could be treated by a surgeon, kept him on board the vessel and undertook the treatment of the case himself. Compensation was decreed to said seaman, and the opinion of Judge Hanford cites the principal authorities for his conclusions.

In *Danvir vs. Morse*, 139 Mass. 323 (a case cited by petitioners), the Court says:

> "So much of the instructions as requested the Court to rule that, if the master believed, though there would be delay in carrying the plaintiff to the port of destination, it would not be a serious delay, nor involve any serious result, then the master was not in fault in deciding as he did, was properly refused. This would have left the matter depend entirely upon the judgment of the master, if honestly exercised. Under the instructions given it was for the jury to consider the condition of the

plaintiff, the situation of the master, the ease with which he might reach another port, the probability of finding medical attendance, and all other circumstances, and to determine whether the plaintiff had sustained the burden of showing that the decision of the master was otherwise than reasonable and proper, which was the true rule."

In answer to the statement in the brief of counsel for the petitioners (p. 6) that neither the Court of Appeals nor the District Court made any specific findings of fact, we say that counsel is in error. Both the District Judge and the judges of the Court of Appeals set out the various facts upon which their conclusions were based.

These findings of fact are, (a) "Neither the master nor any other person on board of the vessel had sufficient knowledge and skill to properly set the leg, or to thereafter give it necessary surgical attention" (Trans. p. 109). "The master of the 'Iroquois' had no skill or experience in treating fractures" (Trans. p. 127).

(b). "Fractures similar to those sustained by libelant will unite, if properly treated by a surgeon, within three or four weeks after they are received, and * * broken bones of a person of the age of libelant, other conditions being the same, will unite more readily than those of a person of mature years" (Trans. p. 110).

(c). "The broken bones * * failed to unite, their fractured ends had become dead and amputation of the leg was necessary in order to save the life of libelant" (Trans. pp. 109, 110). "The bones of the leg failed to unite" (Trans. p. 126).

(d). "There was lack of such treatment, (proper sur-

gical treatment), both in permitting the appellee to remain so long on board a ship in motion and in daily moving him" (Trans. p. 127).

(e). At the time of the accident the wind was fair for Port Stanley and it could have been made in two or three days (Trans. p. 109).

(f). "There were several ports to which the appellee might have been taken for surgical treatment" (Trans. p. 128).

(g). "The ship could have made Evangelistas Island by sailing one or two days out of her course. From that island it seems that the appellee could have been taken by steamer to Valparaiso" (Trans. p. 128).

(h). "The 'Iroquois' herself could have made the port of Valparaiso with a loss of probably not more than four or five days in her voyage" (Trans. p. 128).

(i). "He might have reached the port of Ancud or San Carlos with about the same loss of time" (Trans. p. 128).

(j). "When, on March 30th, the splints were removed, the vessel was as near to San Francisco as to Valparaiso, and there was no recourse except to proceed on her voyage" (Trans. p. 128).

Upon these facts, thus found from the testimony, both the District Court and the Court of Appeals came to the conclusion that the master of the "Iroquois" had committed a breach of the obligation to care for and cure the leg of the libelant which had been broken in the service of the owners of that vessel, and that consequently the vessel was liable in damages to the libelant.

Counsel for petitioners harps a good deal upon the expression used in the opinion of the Court of Appeals "it was the duty of the master to bear away to some port of distress as soon as possible after the occurrence of the accident", as though this has or should have any influence upon the decision of this cause. It is of no consequence that the master did not bear away to a port of distress *"as soon as possible"* after the libelant's leg was broken on February 23rd. Notwithstanding the fact that at that time Port Stanley was his nearest port of distress, if he had deemed it best to take or send the libelant to Evangelistas Island or to Ancud or Valparaiso and thereafter had honestly endeavored so to do, he would have done his duty to the libelant and observed the obligations of the owners of the "'Iroquois" under their contract with the libelant.

The complaint is that the master did not bear away to any port, and that he never had any intention of so doing, whether the libelant's leg got well or not. He considered his duty to his owners and the *valuable* cargo of the vessel as paramount to any duty or obligation to the libelant. The cargo was *valuable* to the vessel and her owners. That the leg was *valuable* to the libelant was a matter of small importance, that is to the master and owners of the "Iroquois".

Respectfully submitted,

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Proctors for Libelant and Respondent.

Service of the within Brief and
receipt of a copy thereof are
hereby admitted, this 9th day
of January, 1904.

Milton Andrews

Counsel for Petitioners